1-20-2016

Matthews v. Sallaz Appellant's Reply Brief Dckt. 43311

Terrence Matthews
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Petitioner-Appellant

IN THE COURT OF APPEALS FOR THE STATE OF IDAHO

Terrence Matthews,	)	
	)	Docket No. 43311
Petitioner-Appellant,	)	District Court CVOC 1306926
	)	
Vs	)	
	)	APPELLANT'S TYPE-WRITTEN
Dennis Sallaz, Daryl Sallaz, National Financial Services, Randolf Lewis,	)	REPLY BRIEFS
	)	
Respondent.	)	
	)	

Appeal from the District Court of the Fourth Judicial District
for Ada County.

The Honorable Patrick Owen presiding.

TABLE OF CONTENTS

ATTACHMENT #4 Memorandum of Decision In Re: TERRENCE JAMES MATTHEWS – Bankruptcy Case No. 03-00998

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

A. Nature of the Case

The respondents are right, this case deals with damages from the loss of a residential property located at 1911 Second Street South, Nampa Idaho as the result of a deed of trust foreclosure that occurred in March 2013. And if the respondents did not admitted to (in their Defendants' Memorandum in Opposition to Plaintiff's Second Motion for Summary Judgment) forgery (documents submitted to dismiss the case in Canyon County to support res judicata claims in Ada County), perjury (testifying that payments were made to catch up their payments in the arrears), abuse of process (in both federal bankruptcy laws and Idaho Statutes and Idaho Rules of Civil Procedure). And the case was dismissed under the Judges' Memorandum Decision and Order RE: Plaintiff's Second Motion for Summary Judgment which under res judicata, but never addressed the issues of forgery, perjury, and wrongful foreclosure. The district court judge concluded in his Memorandum Decision and Order RE: Plaintiff's Second Motion for Summary Judgment until March 16, 2015, CR128-129, saying that *"The ownership interests in the Nampa home were determined when Matthews quitclaimed the interests jointly to himself and Jacqueline. Each became a 50% owner. The divorce court determined that the Nampa home was community property. That finding has never been appealed. In connection with the divorce, Jacqueline's attorneys filed an lien in the amount of $3,400. When the assignee of the attorney's claim and lien filed to foreclose that lien, the lien amount was alleged to have grown by a factor of about 10, to more than $32,000. Due to Jacqueline's default, the attorney's assignee was able to acquire all of Jacqueline's 50% interest for a credit bid of a fraction of the amount claimed as fees under the lien. Terrence's 50% interest in the Nampa home was never affected or impacted by the 2009 lien foreclosure action. Neither Jacqueline's attorney or his assignees ever sold the Nampa home or took any action affecting Matthews' 50% interest. The lien foreclosure court ruled that Matthews*

lacked standing to assert any of Jacqueline's defenses. That ruling essentially precluded Matthews from litigating any of the same issues, or any issues that could have been raised in the 2009 lien foreclosure action. The ruling in the 2009 lien foreclosure case bars consideration of the issues which were raised or which could have been raised in the 2009 lien foreclosure action. As a result, the Court will dismiss this case. Counsel for defendants is directed to submit an appropriate form of judgment within ten (10) days of the entry of this decision." The court said basically res judicata only applies to the issues in the Canyon County Court that this court discussed in his memorandum, but no mentioned on the issues of what transpired in the Ada County Courts and what led to the present lawsuit after the court ruling. Even though there was no final judgment in the Canyon County case. Since the final judgment came about and signed after appellant filed another lawsuit, which Dennis Sallaz got Judge Ford to allow them to file a forged Motion to Dismiss, Order and Judgment to support Sallaz' Motion for Summary Judgment in appellant's complaint filed in Ada County, (and supposedly Judge Ford informed Sallaz that he needed to file documents to close this case without informing the appellant according to Sallaz' affidavit). So in essence there was no final judgment in the Canyon County case.

And appellant filed a Motion for Reconsideration on March 19, 2015 addressing the dismissal of this case. Saying "This court appears to rely res judicata claims addressing 'same parties' 'same claims' saying 'there are three prior proceedings to the current action' The divorce action the 2009 attorney lien foreclosure and the 2011 action. The first action did not claim forgery and fraud upon the court. The second claim made the allegations when Defendant Sallaz forged documents and submitted them to the Ada County Court to claim res judicata. There was no final judgment until after filing the claim in Ada County."

The claims that Judge McKee could not address were never addressed in his court because it happened after a complaint was filed that the defendants committed fraud. And it was not until after the ruling in Judge McKee's court that they committed perjury, submitting false documents, and fraud.

A hearing was heard on this matter on April 23, 2014, appellant argued issues on res judicata did not apply to issues after the trial where appellant got back 50 percent, and did not receive rents or a share of because the respondents paid the arrears and kept payments current, showing documentation of a cashier check and ledger. And Judge Owen not addressing these issues presented in the Motion to Reconsider, says in a surprise, not to be challenged ruling that this ever being an issue, nor ever addressed, nor was appellant allowed to even address this, the judge says (no matter how defendants came about getting the property) says that the appellant was responsible for the payments on the property. (This alone is grounds for appeal when not allowed to defend or address a surprise ruling). An Order Denying Motion for Reconsideration was filed on April 27, 2015.

A second Motion for Reconsideration was filed on April 27, 2025, the same day Judge Owen the Order Denying Motion for Reconsideration was filed.. Which questioned: (1) Did this court allow the plaintiff to address the new ruling this court made for the defendants? No. This court never allowed the plaintiff to address his argument for the defendants. After the court made a new ruling on nothing ever addressed as a defense by the defendants, and completely caught plaintiff by surprise, this court ended saying are there any other matters to discuss in this court? Where if asked if plaintiff wanted to address this surprise 'bombshell' ruling, the plaintiff who did not bring the paperwork wanted to bring up prior statements made by both courts, and testimony by defendants, so would have asked for a continuance to research this under 'implied contracts'. Or what Judge Ford ordered plaintiff's (defendants) to do. Or that Plaintiff could not make payments if not 'sole owner' before quit claiming property to Randolf Lewis and the plaintiff. The plaintiff had a right to address an issue that this court for the first time brings to the plaintiff's attention. (defendant's may have been aware of this since they did not defend against the allegations made by plaintiff in which the defendant's attorney never said one word and didn't even take notes). . . (1) Was the plaintiff responsible for payments on the lien on the Nampa property after the Sheriff foreclosed on the property? This court ruled that plaintiff was responsible for the loan

on the property. When in fact the sole owner of the property on foreclosure was responsible for the loan on the Nampa property, when Judge Ford said that Idaho Housing was to be paid off first. And when they chose to keep the property, they would be responsible for payments made to Idaho Housing, even if the loan was still in plaintiff's name. Since foreclosure and until plaintiff was given back 50% percent interest in the property, the defendant's were responsible to ensure the payments were made to Idaho Housing. Plaintiff was only responsible since given 50% percent interest in the property, and the property was foreclosed upon for payments not made since the 'sole owners' took possession of the property. Because Idaho Housing would not have foreclosed on the property if the payments were paid since the trial.

The court ruled on this matter in May 19th, 2015, without addressing the surprise ruling on if the appellant was responsible for payments between sheriff's sale and when awarded back 50 percent of the property on, CR 166-167, saying "it appearing that the motion is untimely under I.R.C.P. 59 (e), and is not permitted as a post-judgment motion for reconsideration under I.R.C.P. ll (a)(2)(B) of an order made by the Court under either Rule 59(e) or Rule 60(b), and therefore the Court being fully informed"

And 71 days after the final judgment the respondents filed a Memorandum for Attorney Fees, now saying the Motion to Reconsider was timely filed in order to attempt to stop any appeal of this cases. Which was discussed in the appellants brief at page 21 saying "Seventy-one days after the Judgment the defendants filed a Memorandum of Costs, saying now the Motions to Reconsider were timely filed, but would not address the surprise ruling by Judge Patrick Owen on appellant being responsible for payments between 2010 and 2013 when the property was sold at sheriff's sale and when the appellant was awarded 50% of the property, which the court said only 7 payments due after the court ruling were affected by the foreclosure." Then the court would not address the Motion to Reconsider as 'untimely'.

B. Course of Proceedings Addressing Respondent's Arguments

Now the respondents say at page 6, "Matthews filed a timely motion for reconsideration on March 19, 2015. . . and "Matthews then filed a second motion for

reconsideration on May 7, 2015, which was denied by the District Court May 19, 2015" leaving out that the court cannot address this Motion to Reconsider because it was filed 'untimely'. The confusion lied with the fact both the court and respondents both thought the Judge's Memorandum Decision and Order RE: Plaintiff's Second Motion for Summary Judgment was a *final judgmen*t and would not acknowledge till after an appeal was filed and appellant argued the memorandum of fees exceeded the judge's ruling before the court and respondents now acknowledged that the Motions to Reconsider were filed in a timely matter, but left out the documents, and any mention that appellant was responsible for payments in a surprise ruling. So if now the Second Motion to Reconsider was filed timely, why was it not addressed? But the repository shows the Second Motion to Reconsider was filed and a copy attached to the Appellant's Brief filed wth the court not disputed. Add the Order Denying Second Motion to Reconsider document was entered into the record.

Addressing Respondent's Statement of Facts C: The respondents in order to state that appellant was responsible for payments between sheriff's sale in 2010 and when awarded back 50 percent of the property says at page 8 in their Response Brief, that "Appellant Mathews was a part owner between 1999 and 2013." Leaving out the period that appellant did not have any deed to the property. When in fact the Sheriff's Sale which directed the sale to payoff Idaho Housing first, the whole amount owed to the respondent's second and then divide the proceeds between appellant and respondents, shows the respondents were responsible for payoff/payments on the property in the interim until appellant was awarded the property back. The respondents say at page 11, "The Sallaz attorney's fee lien, as construed below, was only imposed against Mitchell's undivided half interest in the Nampa property. (so why did the sheriff's sale attach the over $37,000 against the property to be paid off before dividing the proceeds?) At page 13, the respondents say (which is an issue to contend with) "Matthews' continuing obligation as the sole individual responsible on the underlying note and deed of trust to IHFA remained unimpaired as a result of the Canyon County foreclosure action. (which is saying between the Sheriff Sale and when awarded 50 %

interest in the property in 2013, appellant who was no longer on any title or deed was still responsible for the payments on the property?)

The respondents say at page 16, "Shortly thereafter (court ruling that payments were caught up and made current) Mr. Lewis ceased making the monthly payments on the property and moved out of the residence . . . (when in fact payments were in the arrears since the last payment made by appellant in September 2010). So how can Mr. Lewis cease making payments when he nor Sallaz until he signed over to the property to Lewis ever made a payment on the property?

The respondents say at page 17, pertaining to the check testified to and submitted to the court, "That check was in fact tendered and was included by IHFA's transaction history for the loan" (An admission – no where did they say when they never made payments on the place did they state appellant was responsible for the payments, otherwise the court would have probably given the property back or given them control of the property). . . Matthews had failed to establish that anyone within the Sallaz group of defendants had any enforceable obligation to make the payments secured by the deed of trust. (How about Judge Ford's ruling that Idaho Housing and Finance be paid off first at Sheriff's sale?) If this was true then why didn't Judge McKee give appellant back control of the property, saying because they caught up the payments and were current on payments they would have physical and financial use of the property?

A. <u>The District Court Did Not Err In Granting Summary Judgment For The Defendant Respondents On Res Judicata</u> saying that res judicata was the basis to deny admitted **(1)** forgery. Then talks about the Canyon County case that had nothing to do with forgery. Forgery was committed in Canyon County when Raymond Schild came forward and said the documents to sell the Nampa property were not authorized, condoned, typed or submitted by him. . . **(2)** perjury. Is "likewise barred by res judicata in this proceeding." P.25 response briefs. . . **(3)** Circumvention Of Civil & Bankruptcy Rules (Abuse of Process) -- res judicata

may apply here, except the appellant did appeal this action and the Supreme Court essentially that even as co-defendant, appellant cannot argue procedural issues of wrongs done by both the court (absolute immunity) and attorneys for Jacqueline Mitchell. That may be the only issue that can be precluded if a trial is granted. . .

It is interesting at page 26 of Respondent's brief said underlined **determines that title to the subject property is held 50% by National** and **is encumbered by the first lien of IHFA** (then not bolded showing National takes most of appellants share of the property) and the ***second lien of National***. And again says "proceeds to be disbursed to payy off the first lien of IHFA, then to pay off the second lien held by National, with any remaining proceeds to be split equally between Defendant Matthews and National." That shows that any sale would be for anyone to bid on it to pay off over $80,000. But this is just added information not related to the Argument, but helps explain that the respondents had encumbered appellant's 50 % percent. **(4)** The Alleged "Wrongful Foreclosure" Of The Nampa Property In 2013 As Allegedly Caused By Acts Of The Defendants/Respondents - - at page 28, the respondents state (at court in 2012), **the subject property was now titled in the names of, and held by, Terrence Matthews and Randolf Lewis**. It was not until appellant received the quit claim deed in 2012 and they gave the appellant and the court an accounting of moneys paid to IFHA that the appellant would become responsible for payments. It was only because the respondents caught up and kept the payments current that allowed them to have physical control of the property. And that correctly ended the lawsuit and the complaint was dismissed. But the respondent is incorrect when they said that "Matthews and Lewis had been cotenants of the Nampa property for about 2 years." It was October 5th , 2012. And the property was foreclosed upon in March, 2013 so in essence appellant would only be liable for **6 months** of payments, because the judge would have given appellant physical use of the property to avoid foreclosure since he did not know that appellant was responsible for the payments.

B. The Appellant Matthews Has Failed to Raise Any Issue On This Appeal That Challenged Decision Of The District Court Granting Summary Judgment To The Respondents The respondents say that the complete record was not used to support his claims. And records for what ever reason was not included, the appellant took from the repository and document that were not put forth from the repository the appellant attached that document. The record produced to this court from the repository which addresses the Second Motion to Reconsider shows that Judge Owen made a surprise ruling and the Order Dismissing the Action shows it was dismissed as 'untimely', when it was not. Just like the record shows that Judge Owen only addressed the Canyon County Court rulings in his res judicata. And that is from the RECORD. . . At page 33, respondents say "Matthews undivided half interest in the Nampa property was unaffected by the lien of foreclosure sale." When in fact at the time of the sheriff sale appellant lost the property, had no deed, when the whole property was sold in March 2010. Then respondents argue at page 34 -36, address that the disparity of how an Attorney Lien went from $3,400 to $34,000 was in no position to object to this. . . and discusses a couple cases which appellant will further argue in his arguments. . . And respondents stated that Idaho Code 5-216 applies a five (5) year statute of limitations on an action on a contract. . . Again issues dealing with legal procedure can be ignored if the defendant does not answer the complaint. . . In alleged perjury, the sworn testimony and documents presented to show the court the payments were current were disingenuous at best. INDINGENUOUS: insincere, dishonest, untruthful, false, deceitful, duplicitous, lying, mendacious hypocritical. Twice the Appellant raised issues on this appeal that challenged the decision of the District Court in Granting Summary Judgment to the Respondents. In appellant's brief pp 18-21, says, the first issued in filing his first Motion to Reconsidered, says "Upon filing a Motion to Reconsider on March 19, 2015, showing 41 exhibits (CR 135 – 163) appellant was going to submit to the court saying "This court appears to rely res judicata claims addressing 'same

parties' 'same claims' saying 'there are three prior proceedings to the current action' The divorce action the 2009 attorney lien foreclosure and the 2011 action. The first action did not claim forgery and fraud upon the court. The second claim made the allegations when Defendant Sallaz forged documents and submitted them to the Ada County Court to claim res judicata. There was no final judgment until after filing the claim in Ada County. So the claims that Judge McKee could not address where never addressed in his court because it happened after a complaint was filed that the defendants committed fraud. And it was not until after the ruling in Judge McKee's court that they committed perjury, submitting false documents, and fraud. And the court stating plaintiff was given 50 percent of the property then allowed the defendants to attach their lien to the whole property again does not fall under res judicata. Finally this court addresses Final Judgment: This court uses the divorce as the final judgment to justify the defendants to justify the defendants circumventing the statutes and rules of civil procedure of Idaho. Saying the 'Interest of Justice' an exception to all claims when a gross wrong is done."

The second issue presented to this court said concerning the filing of appellant's Second Motion to Reconsider, says "At a Hearing on April 23, 2015, after a statement read to the court which appellant argued the issues that had since transpired since the last court which do no fall under res judicata. Judge Patrice Own stated that it was appellant's fault that the property was foreclosed upon, that Jacqueline was not on the loan, and thus respondents were not on the loan, and since appellant refused or failed to make payments on the Nampa property it was appellant responsibility for making payments on the property. And Judge Patrick Owen would not even put this into writing in any document on this statement made. But appellant filed a Second Motion to Reconsider on April 27th, 2015 (Which was part of the record and will attach a copy as an Plaintiff's Attachment # 3).

Portions of the Second Motion to Reconsider are read "the court said at page 8, "In the pretrial order, I concluded that the Complaint as initially drafted contained many issues not litigable in this case. Most of the issues raised pertained to Plaintiff's attempt to relitigate issues fully resolved in the Canyon County litigation (In other words none of plaintiff's business) . . Other issues would relate to issues presented after filing the lawsuit in the present case. . . . The judgment directs that a foreclosure sale shall be held with proceeds to be disbursed to first pay off the first lien of IHFA, then to pay off the second lien held by National, with any remaining proceeds to be split equally between Defendant Matthews and National. . . . Now since they were ordered to pay off IHFA first in their bid, and choose not to, then they would be responsible to payoff, make payments or ensure that Idaho Housing and Finance Association were kept current. As sole owners they chose to keep the property, so they would be liable to keep payments current or sell off the property and payoff Idaho Housing. The credit bid guaranteed that Idaho Housing was covered, which was not used or applied to the bid. Except plaintiff was awarded half, and would not be liable on the loan until given or awarded half the property, since the property was taken away from him, he was not liable for any loan. In fact, plaintiff would not be liable until he got 50 percent ownership of the property. . . and even if circumvented Federal Bankruptcy laws, it don't apply. So in essence they admit everything. And plaintiff argued these issues showing they are responsible and could be held liable for their acts. But the court dismissed this case based on res judicata and filed this under the guise in a Memorandum Decision and Order RE: Plaintiff's Second Motion for Summary Judgment which was filed March 4th, 2015. Not a Notice to Dismiss or even an Order to Dismiss. It should have been an 'Order Dismissing Case' or the like. So the plaintiff files a Motion to Reconsider after document was mailed to wrong address, and the defendants argue every issue is subject to this courts res judicata claims. . . at page 27 – 28 as Plaintiff's Attachment #2 says "So the claims that Judge McKee could not address

where never addressed in his court because it happened after a complaint was filed that the defendants committed fraud. And it was not until after the ruling in Judge McKee's court that they committed perjury, submitting false documents, and fraud. And the court stating plaintiff was given 50 percent of the property then allowed the defendants to attach their lien to the whole property again does not fall under res judicata. Finally this court addresses Final Judgment. This court uses the divorce as the final judgment to justify the defendants to justify the defendants circumventing the statutes and rules of civil procedure of Idaho. Saying the 'Interest of Justice' an exception to all claims when a gross wrong is done." That "Motions for Reconsideration must be evaluated in light of the doctrine of the law of the case and a court may only revisit and reverse a prior ruling... on one of five specified grounds... (1) a clearly erroneous prior ruling, (3) substantially different evidence, (5) (especially in that manifest injustice would result were the prior ruling permitted to stand... Failure to apply the doctrine of the law of the case absent one of the [five] requisite conditions constitutes an abuse of discretion. US v Alexander 106 F3d 874, 876 (9th Cir 1997)."

C. The Respondents Are Entitled to An Award of Attorney's Fees On Appeal Under I.C 12-12-121 Since this case is not frivolous, since the Dismissal of appellant's Summary Judgment under the Judge's MEMORANDUM DECISION AND ORDER RE; PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT does not apply res judicata to actions after the Canyon County Court, and the Court at appellant's Motion for Reconsideration did not address any res judicata issues, made a ruling without opportunity to address the ruling, then filed another Motion to Reconsider to have it denied as 'untimely'. And issues of admitted perjury, forgery, and fraud are issues not addressed in appellant's summary judgment, so res judicata does not apply. Now that they admit to this in their memorandum it opens the door to actual admissions to allow the court to sanction Dennis Sallaz.

D. This Court Should Impose Sanctions Under Idaho Appellate Rule 11. Against Appellant Matthews For Pursuing Issues That He Does Not Have Standing To

Raise and Present To The Courts Talk about the kettle being painted black. Anytime someone files a complaint, it is through Discovery and Production of Documents, Summary Judgement, and Hearings that the truth comes out. Justice is supposedly after the truth. This is whether one goes into civil or criminal courts, federal district or federal bankruptcy courts. The appellant got most of his documents from the respondents; the cashier check that respondents already admitted they testified it was to cure a default, and a ledger showing payments were current. The Affidavit admitting circumventing Federal Bankruptcy Laws. The Memorandum in Opposition of Summary Judgment with a lot of admissions to breaking the law. Maybe appellant can't raise all stuff allowed into court in blatant disregard for the Rules of Civil Procedure, Statute of Limitation, Federal Bankruptcy Laws. But this is a starting point to correct the wrongs done here.

So should an appellant be sanctioned for trying to get the court to answer the following questions?

1. If a judge does not have jurisdiction unless a complaint has been filed in a timely matter. Why does only the defendant the only one to have standing to address the statute of limitation? If this is true, anybody can file a lawsuit anytime in the future after the statute of limitation if the defendant is not found.

2. If a party cannot be found after the statute of limitation, a person can publish in the last known area newspaper, in the last known address where they have not live in for years.

3. Can bankruptcy protected property be sold to pay an attorney fees? Appellant found he cannot file issues dealing with the courts in federal court, having it dismissed without prejudice and has legal assistance (counsel) willing to help when this is addressed it this court to why bankruptcy protected property is being ignored in this case.

4. Should res judicata apply to other issues of perjury, forgery and fraud, when the court only concluded in a Summary Judgment that appellant gave 50% of the property to ex-wife?

5. If the courts only issue under Summary Judgment was "That ruling essentially precluded Matthews from relitigating any of the same issues, or any issues that could have been raised in the 2009 lien foreclosure action. The ruling in the 2009 lien foreclosure case bars consideration of the issues which were raised or which could have been raised in the 2009 lien foreclosure action." And this is the crux of the respondents' case. Then the other issues of perjury, forgery and fraud go back to their initial argument of admissions that Sallaz did circumvent federal bankruptcy laws, state statutes, commit perjury, fraud, and forgery in their Memorandum in Opposition to Plaintiff's Second Motion for Summary Judgment filed on December 30th, 2014.

RESPONDENT'S ARGUMENT 1

(1) The district court erred in granting Summary Judgment for the Respondents on the basis of res judicata. (Same argument as Appellant's Argument #1)

Judge Owen dismissed this case under a Memorandum Decision and Order RE: Plaintiff's Second Motion for Summary Judgment after a Pre-trial Conference was to be held. And concluded CR 128-129 that "*The ownership interests in the Nampa home were determined when Matthews quitclaimed the interests jointly to himself and Jacqueline. Each became a 50% owner. The divorce court determined that the Nampa home was community property. That finding has never been appealed. In connection with the divorce, Jacqueline's attorneys filed an lien in the amount of $3,400. When the assignee of the attorney's claim and lien filed to foreclose that lien, the lien amount was alleged to have grown by a factor of about 10, to more than $32,000. Due to Jacqueline's default, the attorney's assignee was able to acquire all of Jacqueline's 50% interest for a credit bid of a fraction of the amount claimed as fees under the lien. Terrence's 50% interest in the Nampa home was never affected or impacted by the 2009 lien foreclosure action. Neither Jacqueline's attorney or his assignees ever sold the Nampa home or took any action affecting Matthews' 50% interest. The lien foreclosure court ruled that Matthews lacked standing to*

assert any of Jacqueline's defenses. That ruling essentially precluded Matthews from litigating any of the same issues, or any issues that could have been raised in the 2009 lien foreclosure action. The ruling in the 2009 lien foreclosure case bars consideration of the issues which were raised or which could have been raised in the 2009 lien foreclosure action. As a result, the Court will dismiss this case. Counsel for defendants is directed to submit an appropriate form of judgment within ten (10) days of the entry of this decision."

The respondents apply res judicata to the issues NEVER addressed of admitted fraud, perjury and forgery. But more interesting is the court judge did not dismiss the case from any motion filed by respondents. Nowhere in the judge's Memorandum dismissing this case does he apply res judicata to issues that have since found that the respondents committed perjury saying payments were caught up and current, forgery when they forged documents to cause the sale and dismissing the case in Canyon County and fraud on the court when they submitted false documents showing payments were caught up, causing the foreclosure of the Nampa property. And nowhere in the motion for summary judgment did it mention anything about who was responsible for the payments on the Nampa property. More importantly, besides not having any reference to the above, there are no documents submitted by the respondent in their short Answer, or their admission in the Motion and Memorandum Opposing Summary Judgment. Nor did the court in the Memorandum Decision and Order RE: Plaintiff's Second Motion for Summary Judgment did the court even mention that appellant was responsible for the payments. But more importantly dismissing the case as 'untimely' without addressing this was really strange, besides the court not producing the Second Motion to Reconsider and the court not making any reference to the Second Motion to Reconsider in denying the motion without a hearing, again the judge as at hearing, in appellant's Second Motion to Reconsider and again in the one sentence saying Memorandum Decision and Order RE: Plaintiff's Second Motion for Summary Judgment denial as 'untimely.' Then denying this Motion saying "it appearing that the motion is untimely under I.R.C.P. 59 (e), and is not permitted as a post-judgment motion for reconsideration under I.R.C.P. ll

(a)(2)(B) of an order made by the Court under either Rule 59(e) or Rule 60(b), and therefore the Court being fully informed"

RESPONDENT'S ARGUMENT 2

(2) Did the appellant raise all issues on appeal that has challenged the decision of the court in granting Summary Judgment?

Since the only issue addressed in the Courts' Memorandum dismissing the case dealt with only the Canyon County case and ownership of the property between parties, the appellant argued all issues in his two Motions to Reconsider were filed addressing appellant's Summary Judgment issues and Surprise ruling by the court. The first, the court did not address any issues CR 159 saying that "the claims that Judge McKee could not address where never addressed in his court because it happened after a complaint was filed that the defendants committed fraud. And it was not until after the ruling in Judge McKee's court that they committed perjury, submitting false documents, and fraud. And the court stating plaintiff was given 50 percent of the property then allowed the defendants to attach their lien to the whole property again does not fall under res judicata. Finally this court addresses Final Judgment. This court uses the divorce as the final judgment to justify the defendants to justify the defendants circumventing the statutes and rules of civil procedure of Idaho." presented by the appellant on his Motion to Reconsider and oral argument, where the court made a surprise ruling on appellant was responsible for the payments. The second attempt was a Second Motion to Reconsider to address issues of responsibility of the payments was submitted by the appellant one day after the hearing, but dismissed as untimely, So besides already argued in briefs the surprise ruling was made by this court. Saying that plaintiff was responsible to ensure the payments were to be made, even without possession or able to collect the rents that co-owners were allowed to collect and have possession of the property. Nor giving appellant an opportunity to address this, and attempted to bring this out in a timely Second Motion to Reconsider, to have it dismissed as untimely. The respondents apply

res judicata to the issues of admitted fraud, perjury and forgery. But more interesting is the court judge did not dismiss the case from any motion filed by respondents. He dismissed this case under a Memorandum Decision and Order RE: Plaintiff's Second Motion for Summary Judgment. And concluded "The ownership interests in the Nampa home were determined when Matthews quitclaimed the interests jointly to himself and Jacqueline. Each became a 50% owner. The divorce court determined that the Nampa home was community property. That finding has never been appealed. In connection with the divorce, Jacqueline's attorneys filed an lien in the amount of $3,400. When the assignee of the attorney's claim and lien filed to foreclose that lien, the lien amount was alleged to have grown by a factor of about 10, to more than $32,000. Due to Jacqueline's default, the attorney's assignee was able to acquire all of Jacqueline's 50% interest for a credit bid of a fraction of the amount claimed as fees under the lien. Terrence's 50% interest in the Nampa home was never affected or impacted by the 2009 lien foreclosure action. Neither Jacqueline's attorney or his assignees ever sold the Nampa home or took any action affecting Matthews' 50% interest. The lien foreclosure court ruled that Matthews lacked standing to assert any of Jacqueline's defenses. That ruling essentially precluded Matthews from litigating any of the same issues, or any issues that could have been raised in the 2009 lien foreclosure action. The ruling in the 2009 lien foreclosure case bars consideration of the issues which were raised or which could have been raised in the 2009 lien foreclosure action. As a result, the Court will dismiss this case. Counsel for defendants is directed to submit an appropriate form of judgment within ten (10) days of the entry of this decision."

Nowhere in the judge's Memorandum dismissing this case does he apply res judicata to issues that have since found that the respondents committed perjury saying payments were caught up and current, forgery when they forged documents to cause the sale and dismissing the case in Canyon County and fraud on the court when they submitted false documents showing payments were caught up, causing the foreclosure of the Nampa property. And nowhere in the motion for summary judgment did it mention anything about who was responsible for the payments on the Nampa property. More importantly, besides not having any reference to the above, there are no documents submitted by the respondent in their short Answer, or their admission in the Motion and

Memorandum Opposing Summary Judgment. Nor did the court in the Memorandum Decision and Order RE: Plaintiff's Second Motion for Summary Judgment did the court even mention that appellant was responsible for the payments. But more importantly dismissing the case as 'untimely' without addressing this was really strange, besides the court not producing the Second Motion to Reconsider and the court not making any reference to the Second Motion to Reconsider in denying the motion without a hearing, again the judge as at hearing, in appellant's Second Motion to Reconsider and again in the one sentence saying Memorandum Decision and Order RE: Plaintiff's Second Motion for Summary Judgment denial as 'untimely.' Then denying this Motion saying "it appearing that the motion is untimely under I.R.C.P. 59 (e), and is not permitted as a post-judgment motion for reconsideration under I.R.C.P. ll(a)(2)(B) of an order made by the Court under either Rule 59(e) or Rule 60(b), and therefore the Court being fully informed" So if the Judgment is filed on March 13, 2015 and the first Motion to Reconsider was filed on March 19, 2015. That is six (6) days. And order denying Motion to Reconsider was made on April 27, 2015 and the Second Motion to Reconsider was filed on April 27, 2015 on the surprise ruling appellant was not allowed to address at court. That is only one (1) day? So if the Judgment is filed on March 13, 2015 and the first Motion to Reconsider was filed on March 19, 2015. That is six (6) days. And order denying Motion to Reconsider was made on April 27, 2015 and the Second Motion to Reconsider was filed on April 27, 2015 on the surprise ruling appellant was not allowed to address at court. That is only one (1) day?

APPELLANT'S ARGUMENT 2

(2) Did the district court erroneously rule that the court only attached to appellant's portion of the property?

The Respondents say that they did not attach any portion of the appellant's property in the sale of the property, and then admit that "National Financial" now the second lien holder on the property would be paid fully before funds would be distributed between appellant and respondents. As argued in the initial Appellant's Brief (argument

2, page 25) *'The judgment directs that a foreclosure sale shall be held with* proceeds *to be disbursed to first pay off the first lien of IHFA, then to pay off the second lien by National, with any remaining proceeds to be split equally between Defendant Matthews and National.?'*

APPELLANT'S ARGUMENT 3

(3) Can real property be sold to satisfy an attorneys' lien?

Common law recognizes two types of attorney liens to secure payment of attorney fees. The first type of attorney lien is called the general, retaining, or possessory lien (the "*retaining lien*").[7] The retaining lien "of an attorney is his right to retain possession of all documents, money, or other property of his client coming into his hands professionally until a general balance due him for professional services is paid."[8] An attorney could not apparently use a retaining lien to obtain a security interest in a client's real property. The second type of attorney lien is called the special, particular, or charging lien (the "*charging lien*"). The charging lien "of an attorney is an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in that particular suit. . . . Logically, an attorney could use a charging lien to acquire a **security interest** in a client's real property, where the attorney's services obtain title to, or possession of, such property for the client.

A lawyer may bring a collection lawsuit against a former client and obtain a money judgment for the unpaid legal billings. However, possession of a money judgment does not automatically give rise to a lien against the judgment debtor's real property. Instead, the judgment creditor is first required to satisfy the judgment through execution against the judgment debtor's personal property. If such personal property is insufficient to satisfy the judgment, then the judgment creditor may seek execution against the judgment debtor's real property.

Executions against realty shall command the officer to whom they are directed to make execution against the realty of the judgment debtor only after execution has been made against the personal property of the judgment debtor that is in the county, and such personal property is insufficient to meet the sum of money and costs for which judgment was rendered."

U.S. district court in *Rubel v Brimacombe & Schlecte, PC.* 86 BR 81 (ED Mich 1988) There,

plaintiff initially retained defendant law firm to represent her in a divorce action. Plaintiff discharged defendant while the action was still pending, retaining substitute counsel. In the stipulation and order of substitution, defendant inserted a provision granting itself a lien against trial or settlement proceeds to secure payment of its fees, unbeknownst to plaintiff. Under the judgment of divorce, plaintiff was awarded the marital home. Defendant, not having received full payment from plaintiff, recorded a "notice of claim of interest" against the marital home with the register of deeds. In plaintiff's Chapter 7 bankruptcy proceeding, she sought to discharge defendant's lien, alleging it was a dischargeable judicial lien under the Bankruptcy Code. The bankruptcy court, applying Michigan law, ruled that defendant had an attorney's charging lien, which was based in common law and was therefore non-dischargeable. An attorney's charging lien for fees could not attach to the client's real property. The district court noted that Michigan case law had not yet addressed the issue: "The courts of Michigan have not ruled directly on the issue of whether an attorney's charging lien may attach to real property."[19] The court then concluded that Michigan courts would adhere to the rule followed by a majority of other states: "[I] conclude that in Michigan courts would follow the majority rule disallowing attorney's liens on real property unless there is an express **contract** between the parties or special equitable circumstances exist." Applying that rule to the case at hand, the district court held that defendant did not have a valid lien against the marital home and reversed the bankruptcy court's ruling. The Court of Appeals framed the issue on appeal as "whether an attorneys' lien can attach to a client's real property."[26] Initially, the court identified the retaining lien and the charging lien as the types of attorney liens recognized by Michigan law, and described the general nature of each type of lien.[27] Regarding the charging lien, the court noted that it attaches to "a judgment, settlement, or other money recovered as a result of the attorney's services," and that "[c]ase law acts as the sole guide with regard to these liens."[28] The court specifically found that the defendant's asserted lien was a charging lien: "In this case, defendant is asserting the right to a charging lien." So the precise issue before the court was actually whether an attorney's charging lien can attach to a client's real property. The Court of Appeals then described the process by which a creditor may obtain and execute a judgment against a debtor, including a debtor's real property. Regarding the attachment of a charging lien, the Court of Appeals acknowledged that "these liens automatically attach to funds or a money judgment recovered through the attorney's services,"

The Court of Appeals states, "disallowing attorney liens upon real property owned by clients unless there is an express written contract between the parties providing for such a lien or unless special equitable circumstances existed."

Combining the majority rule in other states of an attorney's charging lien against a client's real property:

[A]n attorney's charging lien for fees may not be imposed upon the real estate of a client, even if the attorney has successfully prosecuted a suit to establish a client's title or recover title or possession for the client, unless:

(1) the parties have an express agreement providing for a lien,

(2) the attorney obtains a judgment for the fees and follows the proper procedure for enforcing a judgment, or

(3) special equitable circumstances exist to warrant imposition of a lien.

The "express agreement" must specifically provide for a lien on real property. . that "ATTORNEYS shall have general, possessory or retaining CLIENT'S liens, and all special or charging liens known to law[.]" When the client did not pay the attorney's invoices, the attorney recorded a lien against the client's real property, which had been awarded to the client under the judgment of divorce. (Because the real property was obtained as the result of the attorney's services, it was plausible for the attorney to assert an attorney's charging lien against such property.)

"In the absence of a written contract, an equitable lien will be established only where, through the relations of the parties, there is a clear intent to use an identifiable piece of property as security for a debt." A lawyer may assert an equitable lien against a client's real property, based on an agreement with the client that such real property would serve as security for payment of the attorney's fees.

In 1989, the State Bar of Michigan Professional Ethics Committee considered whether it was ethical for a lawyer to acquire an interest in the client's **non-litigated** real property, in Michigan Ethics Opinion RI-40. The committee opined that a lawyer may take a mortgage against the client's real property in order to secure payment of anticipated legal fees, provided that the real property is not the subject matter of litigation in which the lawyer represents the client, and provided that the requirements of MRPC 1.8(a) are satisfied. "A lawyer may obtain a mortgage on a client's property provided the lawyer complies with MRPC 1.8(a), and the property which the mortgage secures is not the subject matter of litigation the lawyer is

conducting for the client[.]"[61] "If the interest charged is usurious, the terms of the transaction are not fair and reasonable to the client and violate MRPC 1.8(a)(1).

In Michigan Ethics Opinion RI-354, the lawyer was representing a client in a contested divorce case. The marital estate consisted of one asset: the equity in the marital home. The husband and wife owned the marital home as tenants by the entireties. The lawyer desired to take a lien against the marital home in order to secure payment of legal fees. The lawyer anticipated that his client would receive, under the judgment of divorce, and as the result of the lawyer's services, either sole or joint interest in the marital home.

The lawyer proposed a two-step transaction. First, the client would execute a warranty deed conveying the client's interest in the marital home to the lawyer. Second, upon entry of the judgment of divorce, the lawyer would re-convey title to the marital home to the client, in exchange for the client's execution of a promissory note and mortgage against the home.

The committee initially noted that the proposed lien would have to satisfy the three requirements of MRPC 1.8(a) (i.e., fair and reasonable terms; opportunity to consult independent counsel; and client's written consent). The committee then referenced MI Eth Op RI-40 (1989), which had opined that a lawyer may take a mortgage against the client's non-litigated real property in order to secure payment of anticipated legal fees.

APPELLANT ARGUMENT 4

(4) Did Respondent Sallaz circumvent the Federal Bankruptcy Laws? (Including attaching appellant's portion of bankruptcy protected property).

In a Memorandum of Decision filed on April 15, 2004, where appellant objected to the allowance of two proofs of claims by Dennis Sallaz and former spouse. Sallaz has also filed a motion to revoke Chapter 13 plan by fraud. . . Sallaz said appellant owed him $10,632.68 for legal services provided to Ms Mitchell and spouse alleged appellant owed ex-wife $109,000. That fraud was based on valuation of the 4 parcels of property. . . and because the bankruptcy estate does not include her interest in any former community property, Debtor owes Ms. Mitchell nothing . . . That Ms. Mitchell obviously overstated her claim against appellant and the bankruptcy estate. . . that Ms Mitchell would be

entitled to $18,000 from property sale proceeds . . . the state court divorce decree granted no lien against the debtor's property . . . for purposes of this bankruptcy case, Ms. Mitchell's claim is unsecured. . . Appellant objects to Mr. Sallaz' proof of claim because, he says, he owes M. Sallaz nothing. . . divorce decree provided that each party is responsible for the payment of his or her own attoney fees. Appellant also suggest that because his bankruptcy estate includes only his undivided one-half interest in the real property, Mr. Sallaz holds no lien on any property of the bankruptcy estate. . . Debtor is not indebted to Mr. Sallaz . . . when the state court entered its decree of divorce, appellant and Ms. Mitchell ceased to own any community property. . . Mr. Sallaz has no basis to assert a claim against appellant's bankruptcy estate. . . (page 13) . . . Furthermore, the legitimacy of Mr. Sallaz's liens is doubtful, even were there any property of the bankruptcy estate to which those liens could attach. In Idaho, an attorney is limited by the types of liens that may be asserted against a client's property. Permissible liens include either "possessory" or "charging" liens. See Dearborn Constr. Inc 03.11.B.C.R. 17, 19 (Bankr. D. Idaho 2002) (citing Frazee v Frazee, 660 P2d 928 (Idaho 1983). Because Mr. Sallaz's liens are not asserted against any "documents, money or other property obtained in his professional capacity,: Frazee, at 929, he likely can not assert a possessory lien against the real estate. And because a charging lien merely allows an attorney to assert an interest in a client's cause of action, and in any judgment or money award procured by attorney's services, Idaho Code § 3-205, Mr. Sallaz's liens on Debtor's real property would not likely be within his reach. *See In re Harris*, 258 B.R. 8, 13-14 (Bankr. D. Idaho 2000)(Denying attorney's claim of a charging lien in monies held by the trustee because there was no "fund" created by the attorney's services). Moreover, "[t]he plain language of [Idaho Code § 3-205] allows a lien in favor of a lawyer solely against the lawyer's client, not against the adverse party to the litigation." Elsaesser v Raeon (In re Goldberg), 235 B.R. 476, 484-85 (Bankr. D. Idaho 1999)(Citing Frazee, 660

P2d at 930). Given the facts here, Mr. Sallaz has not shown he has holds a valid lien on any property of the Debtor or bankruptcy estate to secure payment of his fees . . ."

APPELLANT'S ARGUMENT 5

(5) Are jurists and attorneys still bound by the Idaho Codes, rules of civil procedure and statutes even if a party does not or unable to respond to a complaint?

Where does res judicata apply if these issues in third district court were supposively none of the appellant's business. Just for the record appellant wants this court to just answer the question. Even if the main defendant in the case did not respond to the complaint (and listed also of a defendant in this complaint, he was required to file an ANSWER to this complaint, where appellant was required to answer the complaint. So in essence listed as a defendant, the appellant can and should have been able to respond to the complaint as a whole. If a complaint was filed against the appellant listed as a defendant, then the appellant had the right to challenge the validity of the complaint filed also against him. And question if a judge can take jurisdiction of any case that has surpassed the statute of limitation (especially when the appellant is listed as a defendant)? Has this ever happened? If a defendant fails to respond to a complaint-summons, then plaintiff's can circumvent the rules of civil procedure? Don't have to give an accounting and make up a figure?

So in essence this can set a precedent for even the appellant to file a lawsuit several years past the statute of limitation, publish last known address several years earlier, not have to give an accounting and the courts will not question statute of limitation, accounting or any rules of civil procedure if the defendant does not respond to your complaint. This is so the appellant is not giving bad advise and can use this case to show that plaintiff's filing lawsuits from someone owing monies several years ago past the statute of limitation can still file a lawsuit, name an amount and foreclose on personal or real property? And if denied, use this case as a recent decision to set a precedent in an appeal using this courts' or the district courts' ruling to allow this to use a new ruling that unless the defendant disputes a rule of

law; statute of limitation, accounting, service or any other procedure, a plaintiff can circumvent state rules and statutes?

APPELLANT'S ARGUMENT 6

(6) Does res judicata apply to perjury to the court when respondents testified that the payments were current and had caught up the payments, produced false documentation that the payments were caught up (cashier check) and current (ledger)? (Especially when the court did not dismiss the case addressing any of these issues under res judicata).

Since Judge Owen did not even reference the issues that brought about the present lawsuit dismissing this case dealing of the split of the property and issues dealing with the Third Judicial District Court rulings not appealable (even through appellant tried). Res Judicata applies where the issues have the same parties which does apply here. Same claims which does not apply here, since the claims for the most part here came about after the Ada County case was settled where the appellant got back 50% share of the Nampa property, but would not get a share of the profits because the respondents had caught up their back payments and taxes in the arrears and had kept them current. To find they made no payments, did not catch up the arrears, saying they were not able to assume the loan on the property. Which is not an issue, since they could apply the payments to the loan on the property. And if appellant was responsible for and made the payments then the court would obviously given appellant control of the property or it would have been an issue in another claim.

The case should have never been dismissed. The court could have ruled that only he issues dealing with what transpired since the previous court ruling on fraud and perjury to that court. Then the appellant could only use other issues as laying foundation that lead to the perjury, fraud and forgery to the court. But to dismiss the case only on the issue of ownership of the property in question and issues leading to the sale of the property and not address the other issues that took place in the previous court and admissions by the respondents.

APPELLANT'S ARGUMENT 7

(7) Was appellant responsible for payments or paying off Idaho Housing when the Nampa property was sold at sheriff's sale (especially when the court orders that the respondents were respondents were responsible to payoff Idaho Housing).

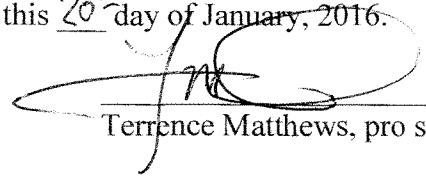
The Third District Court Judge in his Judgement said ... that appellant was responsible for payments made to Idaho Housing and that Ms Mitchell was not on the loan on the property and that since appellant quit claimed half the property to her, then she was nor are the respondents responsible for the payments. Except between September 2010 and 2013 the appellant did not have or own the property, as the respondent stated in his briefs. It was sold at Sheriff's sale in 2010. The order by the court as in argument #1 was *'The judgment directs that a foreclosure sale shall be held with* proceeds *to be disbursed to first pay off the first lien of IHFA..."* How can the appellant be responsible for payments on property illegally taken away from him? Was the appellant suppose to make payments on the property he had no possession of or collected rents from? This is what the court was saying with the bombshell, first time ever brought to the attention of either party (unless there were some ex parte communication), since the appellant could not address this to the court when the court made this determination.

CONCLUSION

The Federal Bankruptcy Laws protect property subject to federal bankruptcy protection, and the respondents attached appellant's share of the property to sell bankruptcy protected property even without filing beyond the statute of limitation, and committed fraud on the court when it sold that property under another attorney's name, and dismissed the case so it could not be appealed from third district court. Then appellant to be awarded half the property, but not given control because the respondents had caught up the payments they fell behind (showing a ledger and cashier check) and

testifying that they had applied the cashier check to catch up payments and a ledger to show that payments were current. And then to have this court inform appellant since realizing that res judicata did not apply to dismiss this case saying appellant was responsible for the payments no matter how they got the property, lied about catching up and making payments and circumvented both this state and federal bankruptcy laws and try to stop the appellant from appealing this case by awarding exorbitant attorney fees 71 days after judgment. Then when attempts were made to show appellant attempted to show he was not responsible for the payments when he did not own the property, the court dismisses the Second Motion to Reconsider as untimely. That the appellant requests this court to remand this to court for a jury trial with instructions on at least the issues of what transpired after the last court awarding half the property and denied proceeds giving the false accounting by the respondents and award costs. This court should determine that issues dealing with the falsifying documents, perjury and fraud committed during the court trial giving back half ownership of the property that led to this lawsuit.

RESPECTFULLY submitted this 20th day of January, 2016.



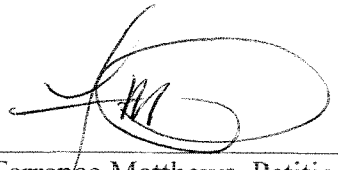
Terrence Matthews, pro se Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on the ___ day of January, 2015, I served a true a correct copy of the petitioner's APPELLANTS REPLY BRIEF on the Defendant's Attorney of Record:

Gary Quigley
Attorney at Law
PO Box 8956
1000 S Roosevelt
Boise, Idaho 83707

Dated this 20th day of January, 2016.



Terrence Matthews, Petitioner pro se

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

In Re:

TERRENCE JAMES MATTHEWS,

Debtor.

Bankruptcy Case No. 03-00998

MEMORANDUM OF DECISION

Appearances:

David L. Posey, Payette, Idaho, Attorney for Debtor.

Kelly I. Beeman, Boise, Idaho, Attorney for Creditors Dennis Sallaz and Jacqueline Mitchell.

John Krommenhoek, Boise, Idaho, Chapter 13 Trustee.

Chapter 13 Debtor Terrence Matthews has objected to the allowance of two proofs of claim, one filed by attorney Dennis Sallaz, and the other filed by Debtor's former spouse, Jacqueline Mitchell. Mr. Sallaz has also filed a motion to

2B

ATTACHMENT # 4

revoke the order confirming Debtor's Chapter 13 plan because, he says, it was procured by fraud. The Court conducted a consolidated evidentiary hearing concerning these matters on March 16, 2003. After due consideration of the evidence and arguments presented by the parties, together with the applicable law, the Court enters the following findings of fact and conclusions of law. Fed. R. Bankr. P. 7052; 9014.

Background and Facts

From the record, the following facts appear undisputed and are, for convenience, presented below in two components. The first section deals with the procedural developments in Debtor's bankruptcy case, with a focus upon the notice provided to Mr. Sallaz and Ms. Mitchell. The second section deals with Debtor's valuation of certain real estate, which is the central issue in Mr. Sallaz's motion to revoke the confirmation order.

A. Debtor's Chapter 13 case.

Debtor and Ms. Mitchell were divorced in a state court action in which Mr. Sallaz represented Ms. Mitchell. Thereafter, Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on March 24, 2003. Docket No. 1. The master mailing list of creditors submitted by Debtor at that time, *see* L.B.R. 1007.1, did not list Ms. Mitchell. It did, however, contain Mr. Sallaz's

name and proper mailing address. Debtor's original Schedule D lists Ms. Mitchell as a secured creditor and lists Mr. Sallaz as an "[a]ssignee or other notification for [Ms.] Mitchell." Docket No. 1. Debtor's Amended Schedule D, filed on May 14, 2003, omitted any mention of either Ms. Mitchell or Mr. Sallaz. Docket No. 10.

The Court's records show that on March 27, 2003, Mr. Sallaz was mailed a notice that Debtor had commenced a case under Chapter 13 of the Bankruptcy Code, that a § 341(a)[1] creditors' meeting would be held on April 25, 2003, and that a confirmation hearing concerning Debtor's proposed plan, a copy of which was enclosed with the notice, would be held on May 27, 2003. On April 2, 2003, Mr. Sallaz was sent a notice that the confirmation hearing had been rescheduled for June 10, 2003. Docket No. 7. Apparently, Ms. Mitchell did not directly receive notice of any of these events or dates and it is unclear if Mr. Sallaz relayed any of the information in the notices he received to his client, Ms. Mitchell.

Neither Ms. Mitchell nor Mr. Sallaz objected to confirmation of Debtor's proposed Chapter 13 plan. But just prior to the June 10 confirmation hearing, the Chapter 13 trustee, Mr. Krommenhoek, filed a written recommendation opposing confirmation. Docket No. 13. From the Court's

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[1] All statutory references are to title 11 of the United States Code unless otherwise noted.

records, it appears that the only party voicing any concerns about confirmation of Debtor's plan was the trustee. The Court continued the confirmation hearing until July 8, 2003. However, the Court informed those in attendance that if the trustee's concerns were resolved, he could so indicate by submitting an order confirming Debtor's plan bearing his signature approval, and the Court would enter the order and vacate the continued confirmation hearing. Minute Entry, Docket No. 14. It appears that the trustee approved a confirmation order on July 8; this order was submitted to and entered by the Court on July 9. Docket No. 17. Thus, a second confirmation hearing was not held.

Mr. Sallaz filed two proofs of claim on July 24, 2003, after the Court had already confirmed Debtor's plan. Mr. Sallaz filed the first proof of claim on his own behalf, alleging Debtor owed him $10,632.68 for legal services provided to Ms. Mitchell. Proof of Claim No. 17. Mr. Sallaz filed the second proof of claim on behalf of Ms. Mitchell. In it, she alleges that Debtor owes her $109,000 based upon the parties' divorce decree. Proof of Claim No. 18.

Debtor objected to both proofs of claim on August 6, 2003. Docket Nos. 18, 19. Later, on February 9, 2004, Mr. Sallaz filed a motion requesting that the Court revoke the order confirming Debtor's Chapter 13 plan because, according to Mr. Sallaz, it had been obtained by fraud. Docket No. 29. More

specifically, Mr. Sallaz suggests that the value Debtor had placed on four parcels of real property was fraudulent.

B. Debtor's valuation of real property.

In the "Judgment and Decree of Divorce," entered in the divorce action on November 26, 2002, the state court identified the parties' community debts and community property. Proof of Claim No. 18, Attach. The divorce court ordered that the community real property be sold; that the community debts be paid from the proceeds; and that from any remaining proceeds, Ms. Mitchell be paid $18,000 as a reimbursement for her separate property contributions to the marriage, with any excess to be shared by the parties. *Id.* The state court also decreed that "[e]ach party shall be responsible for their attorney fees incurred herein, and said fees shall not be paid before the division of the community property as debts of the community." Proof of Claim No. 18, Attach. at 4–5.

The state court made specific findings regarding four parcels of real property. Three parcels of property were identified as community property. Proof of Claim No. 18, Attach. at 2. These three community property parcels were valued as follows:

Property Location	Market Value	Encumbrances
1911 2nd St. South, Nampa, ID	$72,000	$48,000
114 S. Boise Avenue, Emmett, ID	$60,000	$20,000
Clear Creek Prop., Boise Co., ID	$25,000	$0

The fourth parcel, located at 819 S. Commercial, Emmett, Idaho, which was Debtor's separate property, was not valued by the state court, although Gem County had assessed its value at $60,370 for property tax purposes. *Id.* at 2–3; Aff. of Sallaz at 2, Docket No. 30.

During the pendency of the divorce case, Mr. Sallaz filed notices of liens on the three properties located in Nampa, in Boise County, and at 114 S. Boise Ave, Emmett. Proof of Claim No. 17, Attachs. 1–3. These notices, all filed on July 18, 2002, advised that Mr. Sallaz claimed an attorney's lien on the property to secure payment of the fees he earned while representing Ms. Mitchell in the divorce action.

Debtor's initial bankruptcy schedules listed the following information concerning his real property:

Property Location	Market Value	Encumbrances
1911 2nd St. South, Nampa, ID	(½ interest) $30,000	$69,768.72
114 S. Boise Ave., Emmett, ID	(½ interest) $20,000	$40,557.64
Clear Creek Prop., Boise Co., ID	(½ interest) $20,000	$39,578.95
819 S. Commercial, Emmett, ID	$35,000	$29,183.64

See Schedule A, Docket No. 1.

On May 14, 2003, Debtor amended the values in his schedules as follows:

Property Location	Market Value	Encumbrances
1911 2nd St. South, Nampa, ID	(½ interest) $30,000	$54,658.84
114 S. Boise Avenue, Emmett, ID	(½ interest) $10,000	$22,449.62
Clear Creek Prop., Boise Co., ID	(½ interest) $10,000	$22,332.96
819 S. Commercial, Emmett, ID	$35,000	$29,767.64

See Am. Schedule A, Docket No. 10.

Discussion and Disposition

A. Debtor's objection to Ms. Mitchell's proof of claim.

Debtor urges two grounds for disallowance of Ms. Mitchell's proof of claim.[2] First, Debtor argues that the amount claimed due by Ms. Mitchell is

[2] Debtor's written objection to Ms. Mitchell's proof of claim, Docket No. 19, also alleges that Ms. Mitchell's claim was untimely filed. Debtor's counsel withdrew that argument at the hearing.

premised on the values placed on the real property in the parties' divorce decree, and that because the bankruptcy estate does not include her interest in any former community property, Debtor owes Ms. Mitchell nothing. Secondly, Debtor argues that because he has appealed the divorce judgment, it is not final, and Ms. Mitchell's claim should not be allowed.

The Court agrees in part with Debtor's analysis. Ms. Mitchell has obviously overstated her claim against Debtor and the bankruptcy estate.[3] Debtor does not "owe" Ms. Mitchell any sums for her interest in the real property.

Under the state court's decree of divorce, the parties' community ownership interest in the three parcels of real property was effectively terminated. Instead, under the decree, the parties became tenants in common as to these parcels until the property could be sold and the proceeds divided. *See* Idaho Code § 32-712 (requiring courts to assign community property to the respective parties); *Batra v. Batra*, 17 P.3d 889, 895 (Idaho Ct. App. 2001) (noting Idaho Code § 32-712 reflects a policy of separating the parties' interests in property, giving each immediate control over their interests in community property); *McNett v. McNett*, 501 P.2d 1059, 1061 (Idaho 1960) (criticizing a trial court's decision to award real

[3] The applicable law regarding the shifting burdens of proof in claims litigation was clearly explained in *In re Fabos*, 03.1 I.B.C.R. 60, 61 (Bankr. D. Idaho 2003). There is no need to repeat that discussion here.

property to former married persons as tenants in common because such ownership requires an ongoing relationship inconsistent with the goal of a divorce decree). While all community property becomes property of a bankruptcy estate when one spouse files a petition, *see* 11 U.S.C. § 541(a)(2), the same is not true of the co-owned property of former spouses. Under these facts, Ms. Mitchell's one-half interest as a tenant in common in the co-owned real property did not become property of Debtor's bankruptcy estate; her interest in the real estate remains intact and unimpaired. Therefore, she does not hold a valid "claim" against Debtor's bankruptcy estate that would in any way allow her to participate in distributions under Debtor's confirmed plan. Therefore, the amount stated in Ms. Mitchell's proof of claim attributable to her estimate of the value of the real property does not represent a debt, and must be disallowed.

However, Ms. Mitchell's entitlement under the decree to an $18,000 "reimbursement" from Debtor as a result of the state court's division of the parties' debts and property does constitute an allowable claim. Section 101(10)(A) of the Code defines "creditor" as including an "entity that has a claim against the debtor . . . ." 11 U.S.C. § 101(10). In turn, "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or

unsecured . . . ." 11 U.S.C. § 101(5). Because the state court effectively decreed that Ms. Mitchell could recover the $18,000 "reimbursement" from property sale proceeds in which Debtor would otherwise be entitled to share, she has a cognizable "right to payment" for that amount.

Ms. Mitchell offered no evidence that she holds a lien or other security interest in Debtor's interest in the real property to secure payment of this reimbursement claim. Notably, the state court divorce decree grants Ms. Mitchell no lien against Debtor's property to secure her right to payment. Therefore, for purposes of this bankruptcy case, Ms. Mitchell's claim is unsecured.

The Court disagrees with Debtor's contention that the pendency of appeal of the state court divorce decree constitutes a basis to disallow her claim. As explained above, the Bankruptcy Code defines the term "claim" quite broadly and includes rights to payment that are disputed. 11 U.S.C. § 101(5). In *Audre, Inc. v. Casey* (*In re Audre, Inc.*), 216 B.R. 19, 32–33 (B.A.P. 9th Cir. 1997), the Panel affirmed the bankruptcy court's decision not to estimate a claim based on a state family court judgment that was on appeal, but instead to allow the claim as filed. Although much of the *Audre* decision deals with the *Rooker-Feldman* doctrine, the case does support the proposition that, for bankruptcy purposes, a claim based on a state court judgment subject to appeal is valid until such time as

the state appellate court reverses. *Id.*; *see also In re Mitchell*, 255 B.R. 345, 358–61 (Bankr. D. Mass. 2000) (explaining that a claim arising from a California family court judgment being appealed must be considered for Chapter 13 eligibility purposes); *In re Keenan*, 201 B.R. 263, 267 (Bankr. S.D. Cal. 1996) (rejecting the argument that a claim arising from a state court judgment on appeal was subject to estimation by the bankruptcy court). Therefore, the fact that Debtor has appealed the state court's decree of divorce does not, by itself, supply a reason to disallow Ms. Mitchell's claim.

Because Debtor has successfully rebutted the *prima facie* validity of Ms. Mitchell's claim, the Court will sustain Debtor's objection in part. Ms. Mitchell's claim will be allowed as an unsecured claim for $18,000, and she is entitled to share in distributions to unsecured creditors under Debtor's confirmed Chapter 13 plan to that extent. The balance of her claim will be disallowed.

B. Debtor's objection to Mr. Sallaz's proof of claim.

Debtor objects to Mr. Sallaz's proof of claim because, he says, he owes Mr. Sallaz nothing.[4] *See* Docket No. 18. To support this position, Debtor points to the language in the divorce decree quoted above providing that each party

[4] Debtor's written objection to Mr. Sallaz's proof of claim, Docket No. 18, also alleges that Mr. Sallaz's claim was late filed. Debtor's counsel withdrew that argument at the hearing.

is responsible for the payment of his or her own attorney fees. Debtor also suggests that because his bankruptcy estate includes only Debtor's undivided one-half interest in the real property, Mr. Sallaz holds no lien on any property of the bankruptcy estate.

Clearly, the state court did not order Debtor to pay Ms. Mitchell's attorney's fees owed to Mr. Sallaz. In this sense, then, Debtor is not indebted to Mr. Sallaz. However, the Code definition of "creditor" also includes an "entity that has a community claim." 11 U.S.C. § 101(10)(C). A "community claim" is one "that arose [prepetition] concerning the debtor for which property of the kind specified in section § 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case." 11 U.S.C. § 101(7). Finally, 11 U.S.C. § 541(a)(2) includes community property, as defined by applicable state law, in the bankruptcy estate.

Again, as discussed above, when the state court entered its decree of divorce, Debtor and Ms. Mitchell ceased to own any community property. *McNett*, 501 P.2d at 1061. In light of the language in the divorce decree making each party responsible only for his or her own legal fees, and the transformation that occurred upon the parties' divorce of community property into separate (albeit

in some cases co-owned) property, Mr. Sallaz has no basis to assert a claim against Debtor's bankruptcy estate.

Furthermore, the legitimacy of Mr. Sallaz's liens is doubtful, even were there any property of the bankruptcy estate to which those liens could attach. In Idaho, an attorney is limited in the types of liens that may be asserted against a client's property. Permissible liens include either "possessory" or "charging" liens. *See In re Dearborn Constr., Inc.*, 03.1 I.B.C.R. 17, 19 (Bankr. D. Idaho 2002) (citing *Frazee v. Frazee*, 660 P.2d 928 (Idaho 1983)). Because Mr. Sallaz's liens are not asserted against any "documents, money or other property obtained in his professional capacity," *Frazee*, 660 P.2d at 929, he likely can not assert a possessory lien against the real estate. And because a charging lien merely allows an attorney to assert an interest in a client's cause of action, and in any judgment or money award procured by the attorney's services, Idaho Code § 3-205,[5] Mr.

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[5] The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and can not be affected by any settlement between the parties before or after judgment.

Idaho Code § 3-205.

Sallaz's liens on Debtor's real property would not likely be within his reach. *See In re Harris*, 258 B.R. 8, 13–14 (Bankr. D. Idaho 2000) (denying attorney's claim of a charging lien in monies held by the trustee because there was no "fund" created by the attorney's services). Moreover, "[t]he plain language of [Idaho Code § 3-205] allows a lien in favor of a lawyer solely against the lawyer's client, not against the adverse party to the litigation." *Elsaesser v. Raeon (In re Goldberg)*, 235 B.R. 476, 484–85 (Bankr. D. Idaho 1999) (citing *Frazee*, 660 P.2d at 930). Given the facts here, Mr. Sallaz has not shown has he holds a valid lien on any property of the Debtor or bankruptcy estate to secure payment of his fees. If he holds valid liens at all (which the Court doubts) such would attach only to his client's interest in the co-owned property, and not to Debtor's interest in the land. Debtor's objection to Mr. Sallaz's proof of claim will be sustained, and the claim will be disallowed.

C. The motion to revoke the order confirming Debtor's Chapter 13 plan.

Mr. Sallaz asks the Court to revoke its order confirming Debtor's Chapter 13 plan arguing that Debtor and his attorney engaged in fraud. Motion to Revoke, Docket No. 29. This is an extremely serious allegation, but, as shown below, there is nothing in the record to support it. Multiple reasons exist to deny this motion.

First, the Court has determined above that Mr. Sallaz is not a "creditor" in this case. Section § 1330(a) provides that an order confirming a plan may be revoked "[o]n request of a party in interest . . . ." Under these facts, the Court seriously doubts Mr. Sallaz has standing to request relief from the Court.

Second, even assuming he has standing, or presuming instead that he can rely upon the standing of Ms. Mitchell, his client, the motion is not timely filed. The Code requires that a request to revoke an order confirming a Chapter 13 plan be filed "at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title . . . ." 11 U.S.C. § 1330(a). The order confirming Debtor's Amended Chapter 13 Plan was entered on July 9, 2003. Docket No. 17. Mr. Sallaz did not file his motion to revoke this order until February 9, 2004. Docket No. 29. It appears Mr. Sallaz was given proper, timely notice of the commencement of the bankruptcy case. No credible explanation has been offered why Mr. Sallaz, and through him, Ms. Mitchell, failed to involve themselves in Debtor's bankruptcy case so that their arguments that Debtor had grossly undervalued the real estate could have been timely advanced prior to confirmation. *See, e.g., In re Ramey*, 301 B.R. 534, 545 (Bankr. E.D. Ark. 2003) ("If a creditor fails to object to treatment of its claim in the plan, the creditor will suffer the consequences."); *In re Rupert*, 90 I.B.C.R. 216, 218 (Bankr. D. Idaho

1990) (imputing knowledge of relevant notices to the creditor when the notices were directed to the creditor's attorney).

In disposing of similar motions in the past, the Court has also considered whether the moving party may alternatively rely upon Bankruptcy Rule 9024, which incorporates Fed. R. Civ. P. 60, as a basis for setting aside a Chapter 13 confirmation order. *See Carrier v. Croner* (*In re Croner*), 99.1 I.B.C.R. 16, 18 (Bankr. D. Idaho 1999). However, Rule 9024 provides that while Rule 60 applies in cases under title 11, "a complaint to revoke an order confirming a plan may be filed only within the time allowed by . . . § 1330." Fed. R. Bankr. P. 9024. Moreover, recent case law on this issue instructs that § 1330, and not Rule 60(b), is the exclusive basis to seek revocation of a Chapter 13 confirmation order.[6] *See Mason v. Young* (*In re Young*), 237 B.R. 791, 803 (B.A.P. 10th Cir. 1999); *Educ. Credit Mgmt. Corp. v. Robinson* (*In re Robinson*), 293 B.R. 59, 66 (Bankr. D. Or. 2002).

[6] In another case interpreting § 1330, the court denied relief when the creditor knew of the allegedly fraudulent acts prior to confirmation and failed to timely raise the issue. *Bright v. Ritacco* (*In re Ritacco*), 598 B.R. 595, 598–99 (Bankr. D. Or. 1997). The Court's record in this case reflects that Mr. Sallaz had notice of the values Debtor listed in his schedules well in advance of confirmation. Without expressly adopting the holding of *In re Ritacco*, the Court notes it would provide yet another reason to deny Mr. Sallaz's motion.

In short, the motion is late-filed and no legitimate basis exists to disregard the statutory 180-day bar found in § 1330 of the Bankruptcy Code.

Another problem with Mr. Sallaz's approach relates to the procedure he employed to request relief. The Bankruptcy Rules and case law make it clear that a party seeking to revoke a Chapter 13 confirmation order must proceed via an adversary proceeding, not by motion. Fed. R. Bankr. P. 7001(5) ("The following are adversary proceedings: . . . a proceeding to revoke an order of confirmation of a chapter . . . 13 plan . . . ."); *see also In re Schumacher*, 89 I.B.C.R. 134, 135 (Bankr. D. Idaho 1989) ("An action to revoke an order of confirmation requires the filing of a complaint in an adversary proceeding."). The procedure used by Mr. Sallaz in this case is therefore defective.

For each of the above reasons, the motion must be denied. However, under the circumstances, the Court feels compelled to comment on the merits the allegations made by Mr. Sallaz against Debtor and his bankruptcy attorney. In short, Mr. Sallaz totally failed to demonstrate through any competent evidence that the confirmation order in this case was procured by fraud as required by § 1330(a). To revoke a Chapter 13 confirmation order on the basis of fraud, the creditor must prove that: (1) the debtor made a representation; (2) the debtor knew the representation was false when it was made; (3) the representation was made with

the intent to deceive; (4) the creditor relied on the representation; and (5) the creditor was damaged as a result of the representation. *Credit Gen. Ins. Co. v. Briscoe* (*In re Briscoe*), 90 I.B.C.R. 57, 58–59 (Bankr. D. Idaho 1990).

Here, Debtor testified that the initial figures listed in his bankruptcy schedules represented his best estimates of the value of the respective properties at the time of his bankruptcy filing. The Court accepts this testimony. Debtor's opinion of value was based on his experience in buying and renting the properties. However, Debtor also explained that he had not visited all the properties during the course of his divorce proceedings, and as a result, he lacked personal knowledge about the current condition of the properties, and this impacted the accuracy of his valuation. When Debtor was finally able to inspect his properties, he discovered significant damage had occurred to the premises occasioned by the tenants' occupancy and the weather. As a result, Debtor felt the properties had significantly decreased in value. In addition, the amounts owed on the encumbrances against the properties had changed over time. When Debtor realized the values and lien balances were substantially different than what he had listed in his schedules, he amended those schedules. Debtor's testimony stands unrefuted.

Mr. Sallaz argues that because the values Debtor listed in his bankruptcy schedules were lower than those found by the state court in the divorce action, Debtor's scheduled values were false. Therefore, Mr. Sallaz alleges Debtor and his attorney must have intended to perpetrate a fraud on the bankruptcy court by advancing the lower values. The evidence fails to support any such inference. Debtor provided credible testimony as to how he arrived at the values he listed, why he subsequently amended the values, and why the values were different that those used by the state court.[7] Mr. Sallaz presented no evidence to the contrary.

Mr. Sallaz's motion to revoke the confirmation order will be denied.[8]

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[7] Some of Debtor's testimony on this issue reflects a lack of understanding on his part concerning how disputed liens should be taken into account in valuing the properties. In this case, such misunderstanding is not an indicator of fraud.

[8] Further comment on the lack of merit concerning this motion is warranted in this case. From all appearances, it is doubtful that Mr. Sallaz or his attorney conducted much research, if any, concerning the applicable time limit or appropriate procedure for seeking revocation of the confirmation order. In addition, given the elements required under the published case law to prove the confirmation order was procured by fraud, the Court is skeptical whether there was any factual basis for the relief sought. The procedural flaws with the motion noted by the Court above, coupled with the dearth of any evidence that Debtor or his attorney acted improperly, arguably render the motion frivolous. Debtor and his counsel have not asked for an award of attorney fees or costs incurred in defending against the motion, and the Court will resist the temptation to independently impose sanctions in this case. Instead, the Court strongly recommends that Mr. Sallaz and his attorney review the mandate of Fed. R. Bankr. P. 9011 when again considering filing pleadings in this Court alleging that someone is guilty of fraud.

Conclusion

The motion to revoke the order confirming Debtor's plan is time barred, procedurally flawed, and even if it were not, no competent evidence was offered at the hearing to show that the entry of the order was, in any fashion, procured by fraud. For these reasons, the motion will be denied.

Debtor's objection to Mr. Sallaz's proof of claim will be sustained and the claim will be disallowed. Mr. Sallaz holds no enforceable claim against Debtor or any property of the bankruptcy estate.

Debtor's objection to Ms. Mitchell's proof of claim will be sustained and the claim disallowed in part. Ms. Mitchell has failed to show that she holds a secured claim against Debtor or the bankruptcy estate for the value of her interest in the parties' co-owned real estate. However, she does hold an unsecured claim against Debtor for $18,000 for the reimbursement ordered by the state divorce court. Her claim will be allowed in this amount.

A separate order will be entered.

DATED This 15th day of April, 2004.

JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served by the method indicated below, a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

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Note re E-mail service: A ".pdf" version of the above decision/order was electronically transmitted to the parties indicated above. Email service is provided as a courtesy only upon request of a party. To review an electronic image of the original of this document, or to subscribe for email service of future decisions/orders from the Bankruptcy Judges, please access the Court's Internet web site, www.id.uscourts.gov.

CASE NO.: 03-00998

DATED: 4/15/04

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